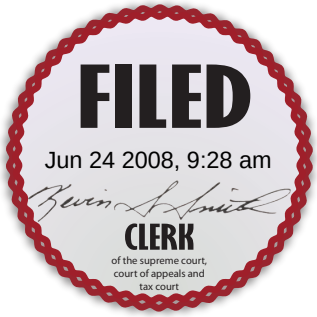

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IN THE
COURT OF APPEALS OF INDIANA

IRVIN NEAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A04-0801-CR-61
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew Hanson, Judge
Cause No. 55C01-0407-FD-207

June 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Irvin Neal appeals his conviction for maintaining a common nuisance as a class D felony.[1] Neal raises one issue, which we revise and restate as whether the trial court erred by trying him in absentia. We affirm.

The relevant facts follow. On July 29, 2004, the State charged Neal with maintaining a common nuisance as a class D felony. At a pretrial conference on August 2, 2006, at which Neal appeared in person and with counsel, the trial court set the trial date for October 30, 2006. The trial court also set the date of the final pretrial conference for October 25, 2006, but later changed the date to October 24, 2006, because of a scheduling conflict.

On October 24, 2006, Neal failed to attend the final pretrial conference. Neal's attorney stated that she had "confirmed" with Neal that he needed to be at the final pretrial conference that day and that he had also failed to attend a scheduled meeting at her office. Transcript at 24. The State requested that Neal be tried in absentia.

Neal did not appear at the trial on October 30, 2006, and his attorney did not object to the trial proceeding without him or move for a continuance. Neal was then tried in absentia, and the jury found him guilty as charged. The trial court ordered that a warrant be issued for Neal's arrest, and, on August 27, 2007, Neal was arrested. At the sentencing hearing on September 26, 2007, the trial court asked Neal if he wished to speak, but Neal declined. The trial court sentenced him to the Morgan County Jail for a term of three years with two years suspended.

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[1] Ind. Code § 35-48-4-13 (2004).

The issue is whether the trial court erred when it tried Neal in absentia. Neal argues that he did not voluntarily waive his right to be present at his trial because "no adequate record was made to ensure that [he] was even aware his case was set for trial on the date it occurred." Appellant's Brief at 5.

A defendant in a criminal proceeding has a right to be present at all stages of his trial. U.S. Const. amend. VI; Ind. Const. art. I, § 13; Fennell v. State, 492 N.E.2d 297, 299 (Ind. 1986). However, "[a] defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right." Lampkins v. State, 682 N.E.2d 1268, 1273 (Ind. 1997), modified on other grounds by 685 N.E.2d 698 (Ind. 1997); Jackson v. State, 868 N.E.2d 494, 498 (Ind. 2007). "The trial court may presume a defendant voluntarily, knowingly and intelligently waived his right to be present and try the defendant in absentia upon a showing that the defendant knew the scheduled trial date but failed to appear." Brown v. State, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005), trans. denied. A defendant who has been tried in absentia "must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver." Id. "As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial." Id. at 228. Finally, a defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia. Id.

Our review of the record reveals that Neal was present at the pretrial conference when the trial court set the dates of the final pretrial conference and the jury trial. When

the trial court later changed the date of the final pretrial conference, Neal's attorney confirmed the new date with him. Nevertheless, Neal failed to appear at the conference and likewise failed to attend a scheduled meeting with his attorney. He then failed to appear at his jury trial. At his sentencing hearing, Neal declined to account for his absences or to object to having been tried in absentia.

We note that, although Neal complains that there is an inadequate record of his knowledge of the trial date, Neal does not allege that he did not know the date. The trial court's order clearly indicates that Neal and his attorney were present during the pretrial conference at which the trial date was set. We conclude that Neal voluntarily, knowingly, and intelligently waived his right to appear at trial, and the trial court did not err by trying him in absentia.[2] See, e.g., Jackson, 868 N.E.2d at 499 (holding that the trial court properly concluded that the defendant's knowledge of the trial date coupled with a lack of explanation for his absence supported a determination that there was a voluntary and knowing waiver); Lampkins, 682 N.E.2d at 1273 (holding that the trial court did not err by proceeding with the defendant's trial in absentia).

For the foregoing reasons, we affirm Neal's conviction for maintaining a common nuisance as a class D felony.

Affirmed.

NAJAM, J. and DARDEN, J. concur

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[2] Neal claims that his jury trial was listed as a second choice and argues that "[n]o record was ever created as to when the case moved to first choice . . . ." Appellant's Brief at 7. We note, however, that the date the trial court set for Neal's jury trial never changed.